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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 388

LEROY J. ROBERTSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On writ of certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR PETITIONER

SAMUEL E. BLACKHAM,
CLYDE D. SANDGREN,
Attorneys for Petitioner.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The oral opinion of the United States District Court for the District of Utah, (R. 29-31) is not reported. The opinion of the United States Court of Appeals, Tenth Circuit, (R. 39-45) is reported in 190 F. (2d) 680.

JURISDICTION

The judgment of the United States Court of Appeals was entered on July 10, 1951 (R. 45-46).

Order extending time to file petition for writ of certiorari to and including November 1st, 1951, was entered September 12, 1951 (R. 46).

Petition for writ of certiorari was filed October 19, 1951 and was granted December 11, 1951 (R. 47).

The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether an award of $25,000 received by the taxpayer as the winner of the Reichhold Music Award, a Pan-American symphony composition contest, was includible in his gross income as defined in Section 22 (a) of the Internal Revenue Code, or constituted a gift excludible from his gross income under Section 22 (b) (3).

2. Whether in computing the tax under Section 107 (b) of the Internal Revenue Code, the income should be apportioned over the years 1937, 1938 and 1939, the last 36 months of the period in which the work on the symphony was performed by the taxpayer, or over the 36-months period covering the taxable year 1947 (when the award was received) and the two years immediately preceding the taxable year.

STATUTES, REGULATIONS AND RULE INVOLVED

The statutes, regulations and rule involved will be found in the appendix, infra, pp.

STATEMENT

The taxpayer is a musician and composer by profession. During the taxable year 1947, and for many years prior thereto, he was Professor of Music at Brigham Young Uni-

versity, and later was similarly employed at the University of Utah. In 1936, he commenced work on a symphony named "Trilogy," and completed the work in 1939. Upon its completion the work was placed in taxpayer's files along with other completed musical compositions (R. 8-9).

In the year 1945, Henry H. Reichhold, a philanthropist, who was also president of the Detroit Symphony Orchestra, announced the "Reichhold Music Award" contest whereby he offered three awards of $25,000, $5,000 and $2,500, respectively, for the best symphonic works written by native born composers of North, Central and South America (R. 9). The broad purpose underlying the contest was as follows:

> "The belief that good music is a force which bridges the distances and differences between the people of various nations has moved us to establish a contest among the composers of the western hemisphere with the object of searching out the most meritorious new work for full symphony orchestra by a native composer of the Americas.
>
> "It is the plan of the Reichhold Music Award Committee first to sponsor preliminary contests in each of the twenty-one Pan American countries, including Canada. The winning compositions of these national series will then be entered in the competition for the grand prizes. The world premiere of those works receiving the grand prize is scheduled to be played by the Detroit Symphony Orchestra, conducted by Karl Krueger.
>
> "The broad purpose underlying this contest is the furtherance of a spirit of understanding and unity among the Nations; and also to be helpful in bringing to the public the most important new music written in the Americas" (R. 9).

Winners of the awards were to be selected from among composers who submitted entries in accordance with published terms and conditions of the contest (R. 9, 34-37). These terms and conditions included the following (R. 35):

"5. Compositions must not have been published or publicly performed, either in full or in part, prior to entry in this contest.

"6. A candidate may submit only one work. Such work must be submitted with an official Entry Blank, wrapped flat, postage prepaid.

"7. Candidates must submit their compositions to the Preliminary Award Jury in the country of their citizenship not later than September 1, 1945.

"8. The score MUST BE SIGNED WITH A PSEUDONYM OR MOTTO, AND MUST BEAR NO MARKINGS THAT WOULD REVEAL THE IDENTITY OF THE COMPOSER. Attached to the score MUST be an Official Envelope duly completed and containing an Official Entry Blank duly completed. Envelopes will not be opened until after the juries have made their decision. Candidates are urged to retain copies of their manuscripts.

"9. The final decisions will be rendered by a jury of internationally known music authorities, under the chairmanship of Karl Krueger, such jury to be named by the Reichhold Music Award Committee.

"10. Each composition receiving a Cash Award, Honorable Mention or a Certificate of Merit shall remain the property of the composer except that he shall be required to grant to the Detroit Orchestra, Inc., a non-profit organization of Detroit, Michigan, all synchronization rights as applied to motion pictures and all mechanical rights as applied to phonograph recordings, electrical transcriptions and music rolls.

"11. The Detroit Orchestra, Inc., also must be granted the exclusive right to authorize the first performance for each or all of the above-named countries of compositions receiving Cash Awards, Honorable Mention or Certificates of Merit.

"12. The Detroit Orchestra, Inc., shall also be granted the exclusive right to designate the publishers of com-

positions winning Cash Awards, Honorable Mention or Certificates of Merit.

"13. The Detroit Symphony Orchestra plans to give at least one broadcast performance of each work receiving a Cash Award within one year from the date of the award. Each work receiving an Honorable Mention or a Certificate of Merit may be given at least one broadcast performance within one year from the date of the award."

After announcement of the contest the taxpayer was urged to enter his composition "Trilogy" but he did not do so as the original announcement required that "parts must accompany each score" (Par. 4, R. 35). Taxpayer had had trouble with his eyes and felt that they would not stand the strain that would be entailed in writing the parts (R. 9, 21). However, when the "Amendments to the Reichhold Music Award Contest Rules" (R. 37), deleted the requirement that parts must accompany the score, taxpayer decided to enter his composition and did so on or about February 18, 1946, by filing an official entry blank (R. 9-10, 36). The entry blank recited (R. 36):

"1. I, the undersigned (represented by the pseudonym or motto * * * NOSTREBOR * * *), submit herewith a composition entitled: * * * TRILOGY * * * for the purpose of participating in the Reichhold Music Award, 1945 upon the terms and conditions printed on the reverse side of this blank.

"2. I agree that it shall be judged by any committee or committees selected by you whose decision shall be final.

"3. I warrant that I am the sole composer of this composition; that it is an original work; and that it has never been published or publicly performed, either in part or in full.

"4. I understand that the composition submitted by me shall remain my property except that, should I win one of the three Cash Awards, I grant to the Detroit

Orchestra, Inc., all synchronization rights as applied to motion pictures and all mechanical rights as applied to phonograph recordings, electrical transcriptions and music rolls.

"5. In the event that this composition receives one of the three Cash Awards, Honorable Mention or a Certificate of Merit, I grant to the Detroit Orchestra, Inc., the first performance rights of said composition in each or all of the countries named on the reverse side of this page.

"6. In the event that this composition receives one of the three Cash Awards, Honorable Mention or a Certificate of Merit, I grant to the Detroit Orchestra, Inc., the right to designate the publisher of said composition.

* * * * * *

"13. I agree to execute and deliver to the Detroit Orchestra, Inc., any documents which it may deem necessary for the purposes set forth in paragraphs '4', '5' and '6' hereof.

"14. If I am a member of any society of composers and/or have assigned any rights or have given any licenses contrary to those conveyed in paragraphs '4', '5' and '6', I agree that, should my composition be tentatively selected to receive one of the Cash Awards, I shall obtain a release from such assignment or license insofar as they are at variance with paragraphs '4', '5' and '6' and if I fail to furnish the same within 60 days, after notice to me, I shall automatically be eliminated from the contest.

"15. I have read the terms and conditions printed on both sides of this entry blank and hereby agree to all the stipulations thereof, * * *."

The composition entered by taxpayer was selected by the award committee as the best one submitted and taxpayer received the $25,000 cash award on December 14, 1947 (R. 10).

In his 1947 income tax return, taxpayer included the $25,000 prize in his gross income and claimed the benefits of Section 107 (b) of the Internal Revenue Code, computing the tax as though the $25,000 had been received ratably during the last 36 months in which he was engaged in composing the symphony, or during the years 1937, 1938, and 1939. This resulted in a tax of $1,121.56 which was duly paid by the taxpayer (R. 10). Attached to the return was a statement claiming that no part of the award was taxable income and that the taxpayer intended to file claim for refund of the tax paid (R. 2, 8). Thereafter, taxpayer on February 16, 1948, duly filed a claim for refund for the tax paid (R. 2-4).

Six months having elapsed since the filing of the claim for refund (R. 4), the taxpayer filed suit on January 24, 1949, for the recovery of the tax (R. 14). Thereafter, on or about October 24, 1949, the Commissioner assessed a deficiency of tax in the amount of $4,605.55, plus accrued interest of $444.34, or a total sum of $5,049.89. This sum was paid to the Collector November 7, 1949. The Commissioner assessed the deficiency on the ground that the tax should have been computed under Section 107 (b) as though the $25,000 had been received ratably over the 3-year period ending with the taxable year 1947 rather than over the 36 months ending December 31, 1939, during which the work was done (R. 4, 8, 10). Taxpayer filed an amended and supplemental claim for refund on November 22, 1949 (R. 4), and on June 12, 1950, filed his amended complaint (R. 1-6).

The District Court found as a fact that the taxpayer,

> "did not produce the composition 'Trilogy' for the purpose of entering it in any contest neither for the purpose of selling it to Mr. Reichhold or to anybody else nor to produce income. It was the inspiration of an artist, his desire to do this creative work and was motivated dominantly and primarily for reasons other than monetary. On the other hand, Mr. Reichhold's purpose in announcing the contest and making the awards was to 'give'—not to employ or to buy or sell and the award made to the plaintiff was not in exchange for the right to capitalize on his opus. The

composition remained and remains the property of the plaintiff and he merely granted to the Detroit Symphony Orchestra, synchronization rights as applied to motion pictures, etc., the right to first performance and the right to designate the publisher of the composition" (R. 10).

and concluded that the award constituted a gift, not includible in taxpayer's income and granted judgment in favor of the taxpayer for the full amount of the tax paid for the year involved (R. 11).

The Circuit Court of Appeals reversed the judgment of the District Court, not only on the main issue upon which that court's decision rested, but also on the secondary issue that was not decided by that court in view of its decision on the main issue, and remanded the case to the District Court with instructions to enter judgment for the United States (R. 45-46).

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals, Tenth Circuit erred:

(1) In holding that the cash award received by the taxpayer as the winner of the Reichhold Music Award was includible in his gross income.

(2) In holding that the amount received as the award in 1947 should be apportioned over the three years just preceding the taxable year, the taxable year being included, rather than over the thirty-six months period in which the work on the symphony was performed by the taxpayer.

(3) In reversing the decision of the District Court.

ARGUMENT

I.

THE CASH AWARD RECEIVED BY THE TAXPAYER IN THE YEAR 1947 WAS A GIFT TO HIM AND WAS NOT PROPERLY INCLUDIBLE IN HIS TAXABLE INCOME FOR THAT YEAR.

Section 22 (a) of the Internal Revenue Code provides that "gross income," among other things, includes "compensation for personal service, of whatever kind and in whatever form paid." Subdivision (b) (3), immediately following, provides that "the value of property acquired by gift, bequest, devise, or inheritance" shall not be included in gross income and shall be exempt from taxation under the statute.

The District Court, upon the stipulation of the parties supplemented by the testimony[1] of the taxpayer, found as a fact on the one hand that the taxpayer did not produce the composition "Trilogy" for the purpose of entering it in any contest, of selling it to Mr. Reichhold or any other person or to produce income; that it was the product of the inspiration of an artist, his desire to do creative work, and was motivated dominantly and primarily for reasons other than monetary. On the other hand, the court found that Mr. Reichhold's purpose and intent in announcing the contest and making the awards was to "give"—not to buy or sell—and the award made to the taxpayer was not in exchange for the right to capitalize on the composition (R. 10). From these findings of fact, the court concluded that the award constituted a gift, not includible in taxpayer's income and granted judgment in favor of the taxpayer. The Circuit Court reversed on this issue as well as on a secondary issue not before the lower court and remanded the case to the lower court for the entry of judgment for the United States (R. 45-46).

The oral opinion of the District Court shows that the evidence and facts were very carefully considered and weighed by the court, and that from such consideration he believed

[1] No evidence was submitted by the Government (R. 29).

that "it is the kind of thing—difficult as it is to draw the line—that falls on the side of giving rather than of selling or buying of either services or compensation" (R. 31).

This Court, as well as others, has held that "intention must govern" in determining whether or not a gift has been made. *Bogardus* v. *Commissioner*, 302 U. S. 34; *Commissioner* v. *Jacobson*, 336 U. S. 28; *Poorman* v. *Commissioner*, 131 F. 2d 946 (C. A. 9th). Whether a gift is effectuated depends upon the real intent of the parties and is primarily a question of fact to be resolved upon the particular circumstances of each case. *Smith* v. *Manning*, 189 F. 2d 345, (C. A. 3rd); *Thomas* v. *Commissioner*, 135 F. 2d 378 (C. A. 5th); *Willkie* v. *Commissioner*, 127 F. 2d 953 (C. A. 6th); *Fisher* v. *Commissioner*, 59 F. 2d 192 (C. A. 2nd); *Schall* v. *Commissioner*, 174 F. 2d 893 (C. A. 5th).

Is the finding of the District Court that in making the award Mr. Reichhold's purpose was to "give"—not to employ or to buy or sell—supported by substantial evidence? We think it is and consequently "must govern" the decision in this case.

In the first place the announcement of the contest stated that "The broad purpose underlying this contest is the furtherance of a spirit of understanding and unity among the nations; and also to be helpful in bringing to the public the most important new music written in the Americas" (R. 33). This shows that the purpose or intent underlying the contest and the making of the award by Mr. Reichhold was inspired from "general motives of philanthropy." *Schall* v. *Commissioner*, supra. Certainly the public was the beneficiary of that philanthropy, as was the Detroit Orchestra, but to say, as the Government contended below, that the taxpayer was not also the beneficiary of that bounty, is to close one's eyes to reality.

We submit that in no sense was this *quid pro quo;* that the taxpayer rendered no services to Mr. Reichhold for which he received compensation as such. True, he received a gain but in the same sense that any beneficiary of a gift, devise or bequest receives a gain which is not taxable.

While the Detroit Orchestra received some benefits from the contest in that it was given synchronization rights as applied to motion pictures, etc., the right to first performance and to designate the publisher of the composition, the record clearly shows that these rights have produced no income or anything of value (R. 25), except possibly whatever value the Detroit Orchestra may have realized by the first performance, and on this phase the record is silent, as it is on any question of value.[2]

On June 18, 1945, the Court of Appeals for the District of Columbia decided the case of *McDermott* v. *Commissioner*, 150 F. 2d 585. That case reversed the Tax Court on the very issue involved herein. Notwithstanding this reversal, however, in the later cases of *Stein* v. *Commissioner*, 14 T. C. 494, and *Waugh* v. *Commissioner*, decided April 5, 1950 (1950 P-H T. C. Memorandum Decisions, Par. 50,095) the Tax Court has expressed an inability to follow the *McDermott* case in all respects. These cases, however, are not repugnant to the *McDermott* case but were in fact distinguished therefrom (as we shall show later) by the court itself and are, we think, entirely reconcilable and consistent with taxpayer's position herein. On March 29, 1951, the United States District Court, District of Maryland, in *Arsham Amirikian* v. *United States*, not reported but found in 1950 P-H par. 72,528, a case quite similar to the instant case, in an exhaustive and well-reasoned opinion followed the *McDermott* case and the decision of the District Court in the instant case, distinguishing these cases on the facts from both the *Stein* case and the *Waugh* case. While the Bureau has announced its intention not to follow the *McDermott* case (I. T. 3960,

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[2]It has been noted that the Government submitted no evidence in this case. Apparently the only issue on which the Government was concerned before the District Court was as to the period involved in composing the symphony. That was the primary point upon which the taxpayer was cross-examined and no effort was made by the Government to establish any value of the rights inuring to the Orchestra (R. 25-29). We believe that the logical inference from the facts established is that these rights were of no substantial value. In any event the record will not substantiate the fact that the $25,000 was paid to the taxpayer by Mr. Reichhold in exchange for these rights, as the Government contended, for the first time, in the Circuit Court.

1949-2 Cum. Bull. 13), this announcement did not come until after the original complaint was filed in the instant case and was no doubt inspired by that complaint. At the time of the filing of the complaint in this case, therefore, neither the *Stein* nor *Waugh* cases had been decided nor had I. T. 3960 been issued, and the *McDermott* case remained the unchallenged authority on the subject.

The *McDermott* case involved the question whether the Ross Essay Prize of $3,000 awarded by the American Bar Association for 1939 constituted payment for services rendered so as to be taxable to recipient as income or was a "gift" excludible from gross income under Section 22 (a) and (b) of the Internal Revenue Code—the precise question involved herein. From the opinion written by Judge Edgerton, which we think is particularly applicable to and dispositive of the issue herein, we quote at length as follows (pp. 587-588):

> "Petitioner's tax liability, if any, depends directly upon whether the award was part of his 'gross income' within the meaning of Section 22 (a) of the Internal Revenue Code in force in 1939, which included 'gains, profits, and income * * * from professions * * * or * * * from any source whatever', or whether on the other hand the award was a 'gift' within the meaning of Section 22 (b) (3). If the American Bar Association in carrying out the wishes of Judge Ross paid petitioner $3,000 for services, the amount was taxable to petitioner, but if it gave petitioner $3,000 the amount was not taxable. The Tax Court found, apparently on the basis of findings which we have discussed, that the award was not a gift from the trustee. We think this was erroneous.
>
> "We think the following circumstances taken together require the conclusion that the award was a gift and not income within the meaning of the statute. (1) No one not talking law would be likely to say that the Association paid petitioner $3,000 for writing an essay which petitioner wrote. In plain English the Association gave petitioner the prize. The Rhode Island court used words in their ordinary sense when it said

of a trust to award prizes for 'the best works produced during the year' by Rhode Island artists: 'The purpose of the prizes is not simply to give a little money every year to the successful artists, but also to arouse the ambition of Rhode Island artists everywhere, and incite their best endeavors.' (2) The purpose of Judge Ross and the American Bar Association in creating and administering the Ross prize was likewise to 'give' and to 'incite,' not to employ or buy. (3) Money may be a gift in law as well as purpose although services are or have been rendered by the donee. (4) Whatever services petitioner rendered were not rendered to the trustee. The American Bar Association neither derived nor sought any profit from the contest or from petitioner's participation in it. On the contrary the entire undertaking was an expense to the trust; the entire advantage accrued to petitioner and the community. This among other things distinguishes the Ross prize from puzzles, guessing contests and publishers' contests operated for commercial purposes. Petitioner received 'financial advantage gratuitously.' (5) An important characteristic of gifts is that, unlike many sorts of 'income', they cannot be counted upon in advance and may never recur. The Ross prize has this characteristic. It is therefore within the policy which exempts gifts of principal from taxation as income. (6) It is safe to say that the dominant motive of a normal contestant for this prize is not a hope of immediate financial gain. He does not regard himself as exchanging his services or his product for money. To one whose life is devoted to scholarship and whose position is affected by his scholarly output, the publication of an outstanding essay is its own reward and may lead to other rewards both tangible and intangible. No doubt the contest provides an added motive which may direct and more or less increase a scholar's effort, but this added motive is more a matter of prestige than of money. (7) The Commissioner does not say that taxes have ever been collected on Nobel prizes, Guggenheim fellowships, Rhodes scholarships, Ross prizes, or any of the many scholarships

and prizes which, like these, have long been awarded on a competitive basis to scientists, scholars, or students. We think we may infer that the practice has been to the contrary. This long-continued administrative interpretation of the law is entitled to great weight. (8) Finally, requiring winners of scholarly awards to pay taxes on them would conflict with the wise and settled policy of encouraging scholarly work."

We submit that there is no more real reason to tax the award as income in this case than in the cases of "Nobel prizes, Guggenheim fellowships, Rhodes scholarships, Ross prizes, or any of the many scholarships and prizes which, like these, have long been awarded on a *competitive* basis to scientists, scholars, or students." Certainly they all stem from philanthropic desires and purposes, are awarded on a competitive basis and have no commercial aspects from which the source of the award hopes to, or does receive any financial remuneration such as the sponsors of our so-called give-away programs on present-day radio. In the latter situations the sponsors receive their *quid pro quo* in their expense deductions, increase in sales, etc. Indeed, we venture the guess that such programs would cease to exist if they were not returning value to the sponsors. There is in such cases no *donative intent* upon the part of the sponsor who provides the prize. In the other cases we have enumerated, in which the instant case logically falls, such awards continue to be made frequently, with no thought of financial gain to the giver, and with no other reward except the benefits derived by society at large and by the donee who is thus encouraged in his scholarly work and to further contributions to the welfare, knowledge and culture of mankind.

If we were able to explore the minds of the donors of the various prizes, fellowships and scholarships above mentioned (which are admittedly gifts and not taxed) and that of Mr. Reichhold, to determine their intentions with respect to the various awards, we would find, no doubt, the same motivations, intentions and philanthropic purposes in the minds of each of them. *And it is these motivations, intentions and philanthropic purposes that are determinative of the fact that a*

gift has been made—not whether the recipient was an active candidate for the gift or whether he was engaged in the pursuit of a trade or business.

In the Circuit Court the Government contended that because the taxpayer is a musician and composer by business and profession and used his professional skill to write the musical composition, the award was compensation to him from such business or profession. This is, of course, the very meat of the Government's case. If this contention were valid, then certainly Nobel prizes, Guggenheim fellowships, etc., would likewise fail as gifts because the winners who receive such awards are usually outstanding in some business or profession and win the awards largely as a result of their skill therein. On the other hand, would the Government concede a different result in the instant case if the taxpayer were not a musician or composer by profession but were, for instance, a lawyer possessed of musical talent, who had theretofore written a musical composition for no particular reason "other than it seemed like it had to be done," and had entered it in the contest? This contention must necessarily fail in any event in the light of the decided cases, for in the *Bogardus* case, supra, the recipients of the gifts would not have received them except for their employment, and in the *Schall* case, supra, the "honorarium" went to a former pastor of a church in "gratitude for his long and valued ministry" at his profession.

Thus, it would seem to be clear that no significance may be attached to the fact that the taxpayer herein was a musician and composer by profession. At any rate, it is not controlling. On the other hand the significant fact is the "intention of the parties, gathered from the facts and circumstances surrounding the transaction, *and particularly that of the payor* * * *." *Willkie* v. *Commissioner*, supra. Emphasis supplied.

In both *Stein* v. *Commissioner*, supra, and *Waugh* v. *Commissioner*, supra, the Tax Court evidences a disinclination to follow the *McDermott* case to its concluson, but a careful study of those cases will demonstrate that while the two courts achieved opposite results in the three cases there is in

fact no real conflict between the decisions and they may be easily reconciled (as the Tax Court did) on the findings of fact.

In the *Stein* case the contest was conducted by the Pabst Brewery in celebration of its one hundredth anniversary. A prize of $25,000 was paid by the company for the best plan of post war employment in the United States. The award was held to be taxable as income. The Tax Court distinguished the *McDermott* case on the ground that Pabst used the contest for publicity in its business and did not treat the awards as gifts, but deducted them as ordinary business deductions in its own tax accounting.[3] The Tax Court said pp. 500-501:

> "Some of the statements or thoughts appearing in the Court's opinion in McDermott v. Commmissioner, supra, do seem to give color and support to the theories advanced in the petitioner's behalf. With all due respect to the court in that case, we find ourselves unable to follow it to its conclusion that the scope and meaning of income as it appears in the Sixteenth Amendment and in the Congressional enactment is so restricted, but, even if we are wrong in presuming to conclude, the McDermott case is rather plainly distinguishable from the instant case when certain of the thoughts and pronouncements of the court there are applied to the facts here.
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> * * * * *
>
> "As suggested above, however, it is our opinion that this case fails to come within the scope of the McDermott case as decided by the court in that there the court did find on the part of the furnisher of the funds a donation intent and from that concluded that the money as given and as received was a gift specifically excluded by Congress from gross income, while here no such intent is shown. In this case the record does no show specifically the characterization of the

[3] While this record is silent on the subject, it may be presumed that Mr. Reichhold claimed no deduction for income tax purposes in the amount of the awards. Otherwise the Government would undoubtedly have established the fact.

expenditures by Pabst on its books, but, however they were denominated, it is clear that Pabst did not regard them as gifts. Unlike the situation in Bogardus v. Commissioner, 302 U. S. 34, where the payor did not treat as expenses the payments held to have been gifts, but charged them directly to surplus, Pabst treated the amount of the awards, including the $25,000 paid for the war bonds awarded to petitioner, as an expense of conducting its business for its current taxable year. Such treatment certainly indicates that Pabst did not regard its award as the making of a gift."

The Tax Court also made the following statement:

"It is accordingly our view that in the McDermott case, as well as in the argument here, too much importance was placed on the question whether the original furnisher of the money intended to make a gift and too little attention was paid to the question whether there was as to the recipient gain or compensation from labor or work at a business or profession."

The Circuit Court below made a similar statement (R. 44) and seems to have largely premised its opinion thereon.

If, however, as held by this Court in the *Bogardus* case, supra, "intention must govern" it is difficult to understand how the Tax Court and the Circuit Court of Appeals could conclude that "too much importance was placed on the question whether the original furnisher of the money *intended* to make a gift", particularly when the Tax Court chose to distinguish the two cases on that very point.

The Tax Court further said:

"The entire undertaking seemingly was a part of Pabst's advertising program. Under such circumstances we could not reasonably conclude that Pabst launched the plan with an entirely educative intent or that the scheme was purely for the purpose of the educational development of the participants, particularly the winning entrants or solely for the public benefit."

In the instant case, however, the contest was not an advertising scheme or commercial in any sense and the District Court *has* reasonably concluded that Mr. Reichhold launched his plan with an entirely philanthropic intent purely in "furtherance of a spirit of understanding and unity among the nations; and also to be helpful in bringing to the public the most important new music written in the Americas" (R. 33). Of great significance is the fact that the Government stipulated that these were the purposes (R. 22).

In the *Waugh* case the prize was awarded in a contest sponsored by The American Farm Economic Association for the best essay on farm price policies. Here again the Tax Court distinguished the *McDermott* case on the facts as follows:

> "Though the facts in the two cases are closely parallel in our view the cases are distinguishable in one important respect. In the McDermott case the Court found on the facts before it, that the purpose of the American Bar Association was donative, that the American Bar Association 'neither derived nor sought any profit from the contest or from petitioner's participation in it' and that 'the entire advantage accrued to petitioner and the community.' "

Likewise, in the instant case the District Court has found that Mr. Reichhold, who gave the award, neither derived nor sought any profit from the contest or from the taxpayer's participation in it and it is conclusively shown that the entire advantage accrued to the public, the petitioner and perhaps, in part, to the Detroit Orchestra.

We are not sure what significance this Court may attach to the fact that the composition in this case was finished years before the announcement of the Reichhold Music Award and other than the mere filing of the entry blank no further work was performed on the composition in contemplation of the contest or the eventual prize, but we think this fact is important and tends to emphasize the fact that no labor or service was performed by the taxpayer for Mr. Reichhold, for which the taxpayer received compensation. The Government

apparently thought this fact to be of prime importance at least in the *Amirikian* case, supra, for it drew from the Court in its decision in that case the following comment:

> "However, the Government now takes the position in the present suit that the Robertson case is distinguishable in that there the musical composition was finished some time before the announcement of the award contest *which was not commercial in any sense and, therefore, it could not be said that money was the motive which dominated the preparation of the composition, contrary to what the Government claims is true with respect to the present plaintiff.*" Emphasis supplied.

It is made clear by the majority as well as the dissenting opinion in the *Bogardus* case, supra, that, in determining whether the receipt of money is a gift or compensation "What controls is not the presence or absence of consideration. What controls is the intention with which payment, however voluntary, has been made."

We submit that not only is there substantial evidence in this case to sustain the finding of the District Court that Mr. Reichhold's intention was to "give"—not to buy or sell but that no other inference can fairly be drawn from a review of the evidence. The District Court's findings and decision should be sustained.

II.

THE FINDING OF THE DISTRICT COURT THAT MR. REICHHOLD'S PURPOSE IN ANNOUNCING THE CONTEST AND MAKING THE AWARD WAS TO "GIVE"—NOT TO EMPLOY OR TO BUY OR SELL—WAS NOT "CLEARLY ERRONEOUS" AND SHOULD BE SUSTAINED.

It is pointed out in the minority opinion of this Court in the *Bogardus* case, supra, that where on the evidence in a case there might be "opportunity for opposing inferences" the judgment of the fact finding tribunal controls. *Elmhurst*

Cemetery Co. v. *Commissioner*, 300 U. S. 37, 57; *Helvering* v. *Tex.-Penn. Oil Co.*, 300 U. S. 481.

This rule is in harmony with Rule 52 (a) of the Federal Rules of Civil Procedure, infra, which in so far as it is material to this case provides as follows:

> "In all actions tried upon the facts without a jury * * *, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; * * *. *Findings of fact shall not be set aside unless clearly erroneous,* * * *." Emphasis supplied.

Applying the above quotation to the present case, although we feel that the conclusions reached by us in the preceding section of this brief (that there is substantial evidence to sustain the District Court's finding of an intention to "give" and that no other inference can fairly be drawn from the evidence) are entirely sound and amply supported by the decided cases and a fair interpretation of the law and regulations, if perchance this Court should determine that we have erred in those conclusions, we submit that there is at least some inference that in making the award Mr. Reichhold intended to "give"—not to buy or sell. If so, the finding to this effect by the District Court is not "clearly erroneous" but, under Rule 52 (a), is controlling of the issues herein and should be sustained, compelling the reversal of the decision of the Circuit Court of Appeals and the sustaining of the decision of the District Court. *Kerr* v. *United States*, 131 F. 2d 450 (C. A. 7th).

III.

IF THE AWARD IS TAXABLE AS INCOME, THE CIRCUIT COURT ERRED IN HOLDING THAT UNDER SECTION 107 (b), INTERNAL REVENUE CODE, IT SHOULD BE TAXED RATABLY OVER THE YEARS 1945, 1946 AND 1947[1] RATH-

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[1]These are the proper years and not the years 1946, 1947 and 1948 as erroneously stated in the Circuit Court's opinion (R. 44). The Circuit Court was also in error in stating the year 1938 as the year of the completion of the work (R. 45).

ER THAN AS THOUGH IT HAD BEEN RECEIVED RATABLY OVER THE YEARS 1937, 1938 AND 1939, THE LAST 36 MONTHS OF THE PERIOD IN WHICH THE SYMPHONY WAS BEING COMPOSED.

It is the taxpayer's contention that in applying the provisions of Section 107 (b) to this case, the amount received in 1947 should be taxed as though received ratably over the last 36 months of the period in which he was engaged in composing the symphony. This would prorate the entire sum back to the years 1937, 1938 and 1939 because the last 36 months of the work consumed all of these years. It is the Government's contention that the entire sum should be prorated to the calendar years 1945, 1946 and 1947 regardless of the fact that in those years only two things occurred that had any relationship whatsoever to the award—(1) the taxpayer submitted his entry in the contest in February, 1946, (R. 9-10, 36) and (2) he received the award in December, 1947 (R. 10).

The District Court's decision that the award received by the taxpayer was a gift, and consequently not taxable income, made it unnecessary for it to decide as to what years the sum received as the award should be prorated. It did not pass on that point.

The Circuit Court, however, apparently without considering or even citing the prior and well-reasoned decision of the Court of Claims in *Williams* v. *United States*, 84 Fed. Supp. 362, precisely in point, and since it was "necessary to return the case," felt that they "should express our views upon the meaning of this statute" [Sec. 107 (b)]. But instead of merely expressing its views on this point and remanding the case to the District Court for its determination, the Circuit Court reversed the cause with instructions to enter judgment for the United States.

It is the petitioner's contention that the Circuit Court erred in the first place in reversing the lower court on a point upon which the latter court had had no reason, or opportunity, to pass, *Hormel* v. *Helvering*, 312 U. S. 552, and that in the

second place, even though this point were properly before the Circuit Court, it erred, as did the Commissioner of Internal Revenue, in its application of the provisions of Section 107 (b).

While we do not intend to minimize its importance thereby, we shall nevertheless not labor this brief with further argument or citation of authorities on the first point, but proceed to a consideration of the proper application of the provisions of Section 107 (b) to the facts in this case.

The record establishes without question that the work on the composition was begun in the autumn of 1936 and was completed at the end of the year 1939 (R. 19-20).[5] Upon completion, the score was put aside and nothing further was ever done to it in the way of correcting or changing it from time to time thereafter (R. 20, 27).

When the contest was announced, the taxpayer was urged to enter his composition, but as the announcement required that "parts must accompany each score" (Par. 4, R. 35), he declined to enter, feeling that his eyes, which had been overworked during college days, would not stand the strain entailed in writing the parts (R. 9, 21). Upon later amendment of the rules governing the contest, eliminating the requirement of writing the parts, the taxpayer decided to enter his composition in the contest and did so on or about February 18, 1946, by filing an official entry blank (R. 9-10, 36).

The taxpayer's composition won the first prize, and he received the $25,000 cash award on December 14, 1947 (R. 10).

As indicated above, the precise issue involved under this subdivision of our brief has been decided by the Court of

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[5]In the Government's memorandum brief in response to our petition for certiorari, it is noted that the taxpayer testified that all steps necessary to earn the prize had not been taken in the three-year period to which he would attribute his earnings (Br. 3). We submit that this is of no significance, even though what was done may be considered as work, because the statute is not concerned with what the taxpayer may be required to do in acquiring the income but is concerned only with the period in which the taxpayer is engaged in performing the work on the composition that produces the income, provided that period is 36 months or more.

Claims in a sound and exhaustive opinion in *Williams* v. *United States*, supra, in which the legislative history of Section 107 was also considered at length.

In that case the taxpayer had worked on an invention from about 1925 until February 7, 1931, when he filed application for patent. The patent was not issued until August 24, 1937. On March 19, 1942, he was paid a sum in lieu of monies due under royalty agreement, which sum was more than 80 per cent of all income he had received from the patent at any time. The Commissioner of Internal Revenue, even though the payment involved was received on March 19, 1947, and no work on the patent was done thereafter, determined that the tax on the sum received should be computed as if that sum had been received ratably during the three calendar years ending December 31, 1942, and the Government so contended.

The court rejected the Government's contention and held that the taxpayer was entitled to compute his taxes as if the sum received on March 19, 1942, had been received ratably during the 36 months ended on February 7, 1931, saying in part (pp. 366-367):

> "Section 107 (a) concededly permits the taxpayer, if his work extended over a period of thirty-six months or more, to compute his taxes as if he had been paid monthly concurrently with his work, no matter when the work was done. If then, the plaintiff had been a lawyer who worked for more than three years and finished his work in 1931, but did not receive his fee until 1942, he could have computed his taxes at the rates in force in the years ending in 1931.
>
> "The Government says that the plaintiff, whose income was from a patent, and therefore covered by Section 107 (b) cannot do as it admits that the lawyer could do, but must compute his tax as if the income received in 1942 had been earned in 1940, 1941, and 1942. In fact, it was not earned in those years. To attribute to Congress an intention to relate the income of e. g., a lawyer, to the time when he did the work for which he was ultimately paid, but, in the next subdi-

vision of the same section of the Code to relate the income of an inventor, not to the period when he did the work but to another period arbitrarily specified for the purpose, although nothing relevant occurred in two of the three years of that period, would be to attribute to Congress a lack of consistency.

"Section 107 (b) in its first sentence speaks of, inter alia, a patent 'the work on which by such individual covered a period of thirty-six calendar months.' In the second sentence it provides that the tax should not be more than it would have been if the income had 'been received ratably over that part of the period preceding the close of the taxable year but not more than thirty-six calendar months.' The expression 'the period' in the second sentence refers, grammatically and logically, to the period referred to in the first sentence, which is the period when the work was done. The fact that the period referred to in the second sentence must precede the close of the taxable year suggests that it should immediately precede it, but the suggestion is not so strong as to enable the interpreter of the language to completely change the reference in the second sentence to 'the period' from its grammatical and logical meaning and make it refer to a wholly different period."

We submit that the decision of the Court of Claims applies the statute correctly and as pointed out the manifest purpose of both subsections (a) and (b) of Section 107 is to relate the income and the tax thereunder *"to the time when the work which produced the income was done, and not to some other arbitrarily fixed and otherwise irrelevant period."*

The Commissioner in the *Williams* case, as well as in the instant case, has interpreted the statute as requiring the taxpayer to compute his income from the indicated sources as though it had *been received ratably over the three calendar years immediately preceding the close of the taxable year.* We submit that the statute does not so provide nor does it do so if the words "36 months" were substituted for the words "three calendar years." Such interpretation completely

ignores the phrase "over that part of the period" appearing in the second sentence of the statute in question, which obviously, as pointed out in the *Williams* case, *"refers, grammatically and logically to the period referred to in the first sentence, which is the period when the work was done."*

It is significant here to note that in the Commissioner's regulations the sum received is attributable to "the part of the period *of the work* which precedes the close of the taxable year, * * *." *Treasury Regulations* 111, *Sec.* 29, 107-2, infra. Emphasis supplied.

We think of further significance in determining the period to which the income is allocable, is the fact that the statute specifies a period of thirty-six calendar months and not three calendar years and that subsection (c), of the same statute, infra, provides for fractional parts of a month for the purposes of the entire section—not to a particular subsection. The Commissioner's interpretation of subsection (b), we submit, would render subsection (c) useless and of no significance whatever to the former.

After a long and careful study and analysis of the statute under consideration, it seems to us that it is intended to, and clearly does provide, in the circumstances set forth, for the allocation of the income received to the period in which the work creating the composition was performed, not exceeding 36 months, regardless of whether that work was performed in the taxable year and the next two immediately preceding years or, as in this and the Williams case, several years and months before the receipt of the proceeds therefrom, or under any combination of months equaling thirty-six in which the work was performed.

Only by such construction can all taxpayers qualifying under Section 107 (b) receive the same treatment in the computation of their taxes at the rates in effect when the work creating the composition that produced the income was performed. We submit that this is the manifest purpose of the statute and the only reasonable interpretation of it. Otherwise, under the Government's construction only the person engaged continuously for three successive years or more, ending between the 15th and 31st days of December,

inclusive, in the taxable year, could allocate his income over the period to which the work was performed. All other persons would have at least some period to which their income would be arbitrarily allocated that would have no relationship whatever to the period in which the work was performed, and particularly is this apparent if "months" rather than "years" are considered. In fact, in the instant case the entire sum received by this taxpayer has been thus arbitrarily allocated by the Commissioner to a period having no relationship in the least to the period in which the work was performed.

We know of no decision, other than the decision of the Circuit Court in the instant case, where the method of allocating income as used by the Commissioner has been upheld. On the other hand, not only has the Court of Claims in the *Williams* case, supra, rejected this method and approved the method used by the taxpayer in the instant case, but the Tax Court of the United States in *Richardson* v. *Commissioner*, 14 T. C. 547 (A) I. R. B. 1950-20 and *Terrell* v. *Commissioner*, 14 T. C. 572 has by application approved the method of allocation as used by this taxpayer. In fact this method is not at odds, but entirely consistent, with the Commissioner's Regulations as shown by the examples therein.

In the *Richardson* case, involving net proceeds obtained from a book which the taxpayer commenced writing not later than November 1, 1941, and completed April 6, 1945, reference to the Rule 50 computation will show that that income, received in 1945, was allocated ratably under Section 107 (b) to three months in 1945, the years 1944 and 1943 and 9 months in 1942.

In the *Terrell* case, involving Section 107 (a), the taxpayer's compensation was for services extending over a period of 78 months from 1937 to June, 1944. Under the Rule 50 computation that income, which was received in 1944, was allocated ratably to six months in 1944 and to the years 1938 to 1943 inclusive.[6]

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[6]In the allocation of income under Section 107 (a) the taxpayer is not limited to a 36-month period.

The Government will no doubt urge, as it has done previously, that Section 107 (b) constitutes an exception to the general rules governing taxation of income and that a taxpayer claiming its benefits must bring himself within the letter of the Congressional grant. *Lindstrom* v. *Commissioner*, 149 F. 2d 344, 346 (C. A. 9th); *Smart* v. *Commissioner*, 152 F. 2d 333 (C. A. 2d), certiorari denied, 327 U. S. 804. We are, of course, well aware of that rule but believe that we have demonstrated that we come clearly, not only within the very letter of the statute, but its spirit as well, and that only by an indifference to the statute or a strained and stilted construction of it can the results reached by the Circuit Court be, in any sense, attained.

The work performed by the taxpayer in producing the musical composition Trilogy was performed during the latter part of 1936 and the years 1937, 1938 and 1939. He did no work on the composition thereafter. If Section 107 (b) has any purpose at all it is clearly to relate the proceeds received from the composition to the years in which the work producing it was performed, not exceeding 36 months. This would allocate the award to the 36 months comprising the years 1937, 1938 and 1939 as was properly done by the taxpayer.

CONCLUSION

For the reasons stated, the judgment below should be reversed.

Respectfully submitted,

SAMUEL E. BLACKHAM,
CLYDE D. SANDGREN,
Attorneys for Petitioner.

48 North University
Avenue, Provo, Utah.

Of counsel
Sandgren and Blackham
Provo, Utah

APPENDIX

Internal Revenue Code:

"SEC. 22. GROSS INCOME.

"(a) *General Definition.* — 'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, business, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

"(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * * * *

"'(3) [As amended by Section 111(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798]. *Gifts, bequests, devises and inheritances.*—The value of property acquired by gift, bequest, devise, or inheritance. * * *"

* * * * *

"(26 U. S. C. 1946 ed., Sec. 22.)

"SEC. 107 [As added by Section 220(a) of the Revenue Act of 1939, c. 247, 53 Stat. 862, and amended by Section 139(a) of the Revenue Act of 1942, *supra*, and Section 119(b) of the Revenue Act of 1943, c. 63, 58 Stat. 21]. COMPENSATION FOR SERVICES RENDERED FOR A PERIOD OF THIRTY-SIX MONTHS OR MORE AND BACK PAY.

* * * * *

"(b) *Patent, Copyright, Etc.*—For the purposes of this subsection, the term 'artistic work or invention', in the case of an individual means a literary, musical, or artistic composition of such individual or

a patent or copyright covering an invention of or a literary, musical, or artistic composition of such individual, the work on which by such individual covered a period of thirty-six calendar months or more from the beginning to the completion of such composition or invention. If, in the taxable year, the gross income of any individual from a particular artistic work or invention by him is not less than 80 per centum of the gross income in respect of such artistic work or invention in the taxable year plus the gross income therefrom in previous taxable years and the twelve months immediately succeeding the close of the taxable year, the tax attributable to the part of such gross income of the taxable year which is not taxable as a gain from the sale or exchange of a capital asset held for more than 6 months shall not be greater than the aggregate of the taxes attributable to such part had it been received ratably over that part of the period preceding the close of the taxable year but not more than thirty-six calendar months.

"(c) *Fractional Parts of a Month.*—For the purposes of this section a fractional part of a month shall be disregarded unless it amounts to more than half a month in which case it shall be considered as a month.

* * * * *

"(26 U. S. C. 1946 ed., Sec. 107.)"

Treasury Regulations 111, promulgated under the Internal Revenue Code:

"Sec. 29.22(a)-1. *What Included in Gross Income.*—Gross Income includes in general compensation for personal and professional services, business income, profits from sales of and dealings in property, interest, rent, dividends, and gains, profits, and income derived from any source whatever, unless exempt from tax by law. * * *

* * * * *

"Sec. 29.22(a)-2. *Compensation for Personal Services.*—Commissions paid salesmen, compensation for services on the basis of a percentage of profits, com-

missions on insurance premiums, tips, pay of persons in the military or naval forces of the United States, retired pay of Federal and other officers, and pensions or retiring allowances paid by the United States (unless expressly exempt) or by private persons are income to the recipients; as are also marriage fees, baptismal offerings, sums paid for saying masses for the dead, and other contributions received by a clergyman, evangelist, or religious worker for services rendered. * * *

* * * * *

"Sec. 29.107-2. [As amended by T. D. 5458, 1945 Cum. Bull. 45.] *Artistic Work or Invention.*—Section 107(b) provides that if, in the taxable year, the gross income of an individual from an artistic work or invention of such individual covering a period of 36 calendar months or more (from the beginning to the completion thereof) is not less than 80 per cent of the sum of (1) the gross income therefrom in the taxable year, and (2) the gross income therefrom in previous taxable years and in the 12 months following the close of the taxable year, then the tax attributable to such gross income in the taxable year shall not be greater than the aggregate of the taxes attributable thereto had it been received ratably over (1) the part of the period of the work which precedes the close of the taxable year, or (2) a period of 36 calendar months, whichever of such periods is the shorter. * * *

* * * * *

"The method of allocating the gross income from the artistic work or invention to the taxable years in which falls any of the calendar months (not exceeding 36 calendar months) included within the part of the period of work which precedes the close of the current taxable year may be illustrated by the following examples:

"'*Example (1).* On October 1, 1942, A, an individual, who makes his returns on a calendar year basis and on the basis of cash receipts and disbursements, received $36,000 in full payment

for a musical composition, the work on which was commenced by A on July 10, 1938, and completed on January 29, 1943. Although the period of work covers 55 calendar months, allocations may be made to only the last 36 calendar months included within the part of the period of work which precedes the close of 1942 (the current taxable year). Therefore, $1,000 ($36,000 divided by 36) must be allocated to each of the 36 calendar months preceding January 1, 1943. Accordingly, $12,000 is allocated in 1940, $12,000 in 1941, and $12,000 in 1942 (the current taxable year).'"

* * * * * *

Federal Rules for Civil Procedure:

"Rule 52 (a)

"In all actions tried upon the facts without a jury * * *, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; * * *. Findings of fact shall not be set aside unless clearly erroneous, * * *."